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No. 88-1039

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM FRENCH SMITH, ET AL., PETITIONERS

v.

ANTHONY J. PRISCO, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Respondent concedes that the first question presented in the petition is the subject of an express conflict among the circuits and warrants review by this Court. But respondent contends that the petition should be denied nonetheless (or should be granted only on the first question) because, he claims, the second question does not merit plenary review. In respondent's view, the second question involves nothing more than an inquiry into the state of the law in October 1983.

Respondent's claim rests on a misunderstanding of our second question. That question warrants plenary review because the Third Circuit's decision on the merits of petitioner Smith's qualified immunity claim erroneously decided two important, practical, and often-recurring issues regarding the implementation of the qualified im-

munity defense. *First,* this Court has repeatedly made clear that a federal official cannot be held liable for damages unless preexisting law made "apparent" the illegality of his challenged conduct. *Anderson* v. *Creighton*, 107 S. Ct. 3034, 3039 (1987); Pet. 14 & n.15. Applying that principle, the District of Columbia and Fourth Circuits have held that a disagreement *within* the same circuit entitles a defendant to qualified immunity. Pet. 18 n.18. By contrast, the Third Circuit in this case held that government officials can be held liable for damages when there is a marked disagreement *among* the circuits. The ruling below therefore is inconsistent with the approach followed in the District of Columbia and Fourth Circuits, and cannot be reconciled with this Court's teachings.

Respondent's only answer to our argument is to treat as dictum the Second Circuit's statement in *Leonhard* v. *Mitchell*, 473 F.2d 709, 713, cert. denied, 412 U.S. 949 (1973) (*Leonhard I*), that a noncustodial parent has no clear constitutional rights to custody or visitation. That contention is wrong. Not only was the Second Circuit's conclusion essential to its holding that mandamus was inappropriate in that case, Pet. 18-19, but the Second Circuit itself has taken the position that the statement in *Leonhard I* was part of the holding in that case. *Leonhard* v. *United States*, 633 F.2d 599, 605 (1980), cert. denied, 451 U.S. 908 (1981) (*Leonhard II*), quoted at Pet. 19 n.19. Moreover, respondent overlooks the fact the Eighth Circuit expressly rejected the proposition that a noncustodial parent has a due process right to notice before his or her child is admitted into the Witness Protection Program. *Ruffalo* v. *Civiletti*, 702 F.2d 710, 715 (1983). The circuits therefore were clearly in disagreement on the procedures required by due process in the circumstances of this case.

Second, this Court has recognized that public officials are entitled to qualified immunity unless "their conduct" violated the plaintiff's clearly established rights. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). And the courts of appeals have uniformly rejected the contention that a public official may be held liable on a respondeat superior theory. Pet. 21. In circumstances identical to those in this case, the Second Circuit held that several federal officers, including then-Attorney General Bell, were properly dismissed from a lawsuit because "they were not alleged to have participated personally in the removal and concealment of the children." *Leonhard II*, 633 F.2d at 621 n.30. By contrast, the Third Circuit in this case refused even to consider the claim advanced by petitioners Meese and Morris that they cannot be held liable since respondent has not alleged that they took any action that violated his rights. The Third Circuit's decision therefore is inconsistent with settled law in the other circuits.

Respondent's only answer is that petitioners Meese and Morris are, at most, entitled to no relief other than a remand to the district court for it to determine whether respondent should be permitted to amend his complaint to allege such facts. Br. in Opp. 7 n.3. That response is inadequate. At no time throughout this lawsuit has respondent claimed that he can allege any such facts, and we are aware of none. Indeed, petitioner Meese was not even Attorney General during the relevant period. Pet. 20 n.20. Allowing a plaintiff to sue a public official for damages in the hope that he can later develop some factual support for his claim threatens precisely the type of harm that the qualified immunity doctrine was designed to avoid. Respondent's failure to allege that petitioners Meese and Morris took any action to violate his rights entitles them to a dismissal of respondent's claims under qualified immunity principles, not simply a remand for further proceedings.

In sum, the Third Circuit held that a Cabinet Officer is not entitled to qualified immunity for actions taken by subordinates—actions in which he had no personal involvement, and as to which the courts of appeals are in disagreement on the correct rule of constitutional law. And if that official is named in a prayer for equitable relief, according to the Third Circuit, he cannot take an interlocutory appeal under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), to avoid the threat of damages liability. Because all three rulings eviscerate the qualified immunity doctrine recognized by this Court and conflict with the decisions of other courts of appeals, all three rulings warrant plenary review.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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